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No. 80-419

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

STATE OF ARIZONA,
Petitioner,

vs.

MARICOPA COUNTY MEDICAL SOCIETY,
MARICOPA FOUNDATION FOR MEDICAL CARE, and
PIMA FOUNDATION FOR MEDICAL CARE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE COMMONWEALTHS OF KENTUCKY AND MASSACHUSETTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Is an agreement among competing physicians establishing fee schedules for their individual services a per se violation of section 1 of the Sherman Act?

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INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West

Virginia, Wisconsin, Wyoming, and the Commonwealths of Kentucky and Massachusetts respectfully submit this brief *amici curiae* in support of Arizona's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in accordance with Supreme Court Rule 36.

The *amici* states represent nearly every sovereign state in the Union and the respective chief law enforcement officers of those states who are charged with the responsibility of enforcing state antitrust guidelines modeled, for the most part, on the Sherman Act. [1] These various state antitrust laws are judicially construed in a manner consistent with this Court's interpretation of federal antitrust laws. [2] Accordingly, the decision of the Ninth Circuit may impact directly on the states' ability to prevent unreasonable restraints of trade and commerce within their borders.

The attorneys general of the *amici* states, as counsel to professional licensing boards, have the responsibility of advising those regulators whether horizontal price agreements among medical and other professionals violate the antitrust laws. Because the decision of the Ninth Circuit Court of Appeals raises serious doubt as to whether the conduct of certain professions is exempt from the antitrust laws, it has caused great uncertainty as to what advice regarding horizontal price agreements may be appropriate.

Only recently, the United States Congress enhanced the states' role in antitrust enforcement by authorizing substantial appropriations for the purpose of developing or expanding each state attorney general's enforcement capability. 42 U.S.C. § 3701. The signifi-

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[1] *E.g.*, Neb. Rev. Stat. § 59-801 (Cum. Supp. 1978).

[2] *E.g.*, *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 716, 144 N.W.2d 1, 9 (1966).

cance of the state attorneys generals' position in assuring nationwide antitrust compliance was recognized further by federal legislation which authorized the states to sue as *parens patriae* to recover damages for citizens injured by violations of the Sherman Act. 15 U.S.C. § 15(c). Against this tapestry of increased federal concern for viable state antitrust enforcement is the ironic consequence of the Ninth Circuit decision: increased medical costs to Arizona's citizens and also to the state which reimburses for medical expenses incurred from health care insurance; a result which impedes the efforts of state antitrust officials.

Clearly, the *amici* states have direct and substantial interests which are jeopardized by a decision which establishes a separate standard of antitrust liability for doctors and the medical care industry. And the reasoning employed by the circuit court in arriving at this decision has cast a cloud of uncertainty over previously established principles of antitrust decisional law.

QUESTION PRESENTED

Is a horizontal agreement among competing physicians establishing fee schedules for their individual services a per se violation of section one of the Sherman Act?

STATUTORY PROVISION INVOLVED

Section one of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

The petitioner State of Arizona filed this antitrust ac-

tion for declaratory and injunctive relief on its own behalf and, as *parens patriae,* on behalf of Arizona's citizens pursuant to 28 U.S.C. §§ 1331 and 1337 and section 16 of the Clayton Act, 15 U.S.C. § 26.

The respondents are three private trade associations of doctors, established by medical societies in Maricopa and Pima County to promote the practice of fee-for-service medicine in Arizona. These respondents, the Maricopa County Medical Society, the Maricopa Foundation for Medical Care, and the Pima County Foundation for Medical Care include in their membership more than 1,000 doctors in Maricopa County and more than 400 Pima County physicians, substantial proportions of the practicing physicians in Arizona's two most populous counties.

The respondent foundations prepared and adopted physician fee schedules which established fees to be charged for nearly all medical procedures performed by the member doctors. From 85 to 95 percent of the foundation members charged their patients at or above the fee schedule rates. To further assure uniform payment for their services, the foundations' members agreed to accept the prices fixed by their fee schedules as full reimbursement for services covered by foundation endorsed health insurance plans.

Widespread meetings, discussions and agreements among the membership preceded any uniform increase in the compensation rates established by the foundation fee schedules. After adoption by the membership, these fee schedules were published and circulated to both member and nonmember doctors throughout Arizona, provoking an inflationary effect on medical costs generally. Advance notice of the periodic schedule increases was provided to foundation-approved underwriters, allowing them to increase the

insurance premiums necessary to offset the added expenses.

Member doctors threatened to leave the foundation unless the fixed and scheduled rates were increased, a blatant indication that fees for individual services were collectively controlled and could not be adjusted by individual doctors or insurers.

Following discovery which established the facts set forth above, [3] the State of Arizona moved for partial summary judgment on the issue of liability. On June 5, 1979, the district court denied that motion on the ground that the price agreements at issue should be analyzed under the rule of reason. [4]

On August 6, 1979, pursuant to 28 U.S.C. § 1292 (b), the district court granted the petitioner's motion for certification for interlocutory review of the court's ". . . determination that the Rule of Reason approach should be used in analyzing the challenged conduct." [5]

The Ninth Circuit Court of Appeals granted permission to appeal and consolidated the § 1292(b) appeal with Arizona's pending appeal of the district court's vacation of an interlocutory injunction. The appeals panel stayed the district court order, and enjoined the respondents from establishing a new fee schedule pending appeal.

In a two to one decision, the court of appeals entered an order on November 19, 1979 which affirmed the district court's decision and dissolved the Ninth Circuit stay. On March 20, 1980, the court of appeals issued its opinion. [6]

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[3] Petitioner's Statement of the Case at 2-5.
[4] Petitioner's Appendix D.
[5] Petitioner's Appendices E & F.
[6] Petitioner's Appendix A.

The State of Arizona seeks review on the question of whether the respondents' horizontal price agreement constitutes price fixing which is illegal per se under section one of the Sherman Act.

REASONS FOR GRANTING THE WRIT

A. Neither Congress nor the Supreme Court has Recognized the Ninth Circuit's "Reasonable Price" Defense to Horizontal Price Fixing.

The statutory provision directly at issue in this case is section one of the Sherman Act, 15 U.S.C. § 1. However, the Court must be mindful that its interpretation of this provision will reach far beyond the limits of the federal law. The *amici* states have identical or similar "Sherman Act" provisions in their local antitrust laws which will be interpreted by state judges in accordance with federal court decisions.[1] Consequently, the states' ability to enforce antitrust law compliance under both federal and state law is jeopardized by the decision of the Ninth Circuit.

Section one of the Sherman Act simply and clearly states that contracts, combinations, or conspiracies which restrain trade or commerce are illegal. Whether or not such agreements or trusts caused the

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[1] For example, Neb. Rev. Stat. § 59-829 (Cum. Supp. 1978) provides as follows:

> When any provision of sections 59-821, 59-828, 59-829, and 84-214 or any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing sections 59-821, 59-828, 59-829, and 84-211 to 84-214 or any provision of Chapter 59 shall follow the construction given to the federal law by the federal courts.

And Neb. Rev. Stat. § 59-1603 (Cum. Supp. 1978) provides that "[A]ny contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful."

Accord, e.g., Ill. Rev. Stat., ch. 38, § 60-30, et seq. (1979); 6 Del. Code Ann. § 2113 (Supp. 1979); Md. Com. Law Code Ann. § 11-202(a)(2) (1975).

establishment of minimum, maximum, or even "reasonable" prices, the statute makes no exception for the result achieved by the illegal act. As this Court very recently reaffirmed, the Sherman Act's ban against horizontal combinations which fix prices among competing providers of goods or services cannot be justified by a defense of "reasonable" economic impact.

> A horizontal agreement to fix prices is the archetypal example of such a practice. It has long been settled that an agreement to fix prices is unlawful *per se. It is no excuse that the prices fixed are themselves reasonable.*

Catalano, Inc. v. Target Sales, Inc., ___ U.S. ___, 100 S.Ct. 1925, 1927 (1980) (Emphasis supplied).

The Ninth Circuit's decision in the instant case preceded this Court's clear delineation of the standard for per se analysis as set forth above. Perhaps this is why Judge Sneed, after finding that the respondent foundations' fee schedules had indeed fixed the price of medical services, was reluctant to conclude such an arrangement was illegal per se. Rather, the majority opinion relied upon language in this Court's decision in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978), as holding that the crucial determination of whether such a horizontal agreement violates the Sherman Act depends on its "impact on competitive conditions." * But the foregoing phrase taken from this Court's discussion of the historical antecedents of the rule of reason analysis in *Professional Engineers* was taken out of the context of the holding. The discussion of the rule of reason standard in *Professional Engineers* occurred because the trade restraint at issue was not the fixing of prices, but rather an association restriction on competitive bidding, a practice ancillary to commercial transactions; a practice af-

* Petitioner's Appendix A at 4.

fecting, but not directly establishing prices. But the holding of this Court was "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 696. Allowing such a defense would fly in the face of the legislative judgment reflected in the Sherman Act which embraces the reasoning that competition assures lower prices and, further, "precludes [judicial] inquiry into the question whether competition is good or bad." *Id.* at 695. Consequently, the Court's opinion in *Professional Engineers* directs that the rule of reason analysis *should not* be employed when the trade restriction results in the fixing of rates or prices by private agreement. *

> The Rule of Reason suggested by *Mitchell v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.* 85 F. 271, 282-283 (CA6 1898), aff'd, 175 U.S. 211. *That case,* and subsequent decisions by this Court, *unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.*

Id. at 689 (Emphasis supplied).

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* The Court in *Catalano* later affirmed the nonapplicability of the rule of reason in *Professional Engineers,* stating that:

> [A]n agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry.

Catalano, supra, 100 S.Ct. at 1928.

Similarly, while holding that the blanket copyright licenses at issue in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), did not directly fix prices, this Court again reaffirmed that "agreements among competitors to fix prices on their individual goods and services are . . . within the *per se* category." *Id.* at 8.

The refusal of the Ninth Circuit majority to apply the per se rule had "other roots," apparently revealed in footnote four of the opinion. [10] Therein the lower court suggested that decisional law is unsettled on the question of whether per se rules should apply to horizontal maximum price agreements. To the contrary, this Court has held that combinations fixing maximum prices are illegal per se. In *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), where both horizontal and vertical price fixing aspects were present, the Court concluded:

> [A]greement[s] among competitors to fix maximum resale prices . . . no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, *depressing*, fixing, pegging, or *stabilizing* the price of a commodity . . . is illegal *per se*."

Id. at 213 (Emphasis supplied).

The Court later affirmed its holding in *Albrecht v. Herald Company*, 390 U.S. 135 (1968), which found maximum price fixing illegal per se. And the case at bar clearly illustrates the practical effects of such maximum price schedules. From 85 to 95 percent of the member physicians charged prices which either

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[10] Petitioner's Appendix A at 7, n. 4.

equaled or *exceeded* the rates set by the foundation fee schedules. [11] As Judge Larson aptly noted in his dissent, the cost control justification for such maximum fee schedules "is illusory and nonexistent." [12]

The Ninth Circuit majority has clearly misapplied these recent decisions of the Court to a case of blatant horizontal price fixing. If allowed to stand, the decision of the circuit court will be read as creating a new defense to the charge of price fixing, and will further erode the clear mandate of section one of the Sherman Act.

B. Neither Congress nor the Supreme Court has Recognized a Separate Standard of Antitrust Liability for Services Provided by the "Learned Professions" in Cases Involving Direct Restraints on Prices.

The majority opinion of the court of appeals concluded by drawing comfort from this Court's "reiteration [13] . . . that marketing restraints that regulate professional competition may pass muster under the Rule of Reason even though similar restraints on ordinary business competition would not." [14] Such comfort is warranted only if this Court accepts the Ninth Circuit's apparent attempt to regard price fixing as no different than any other type of market restraint.

However, this Court has not recognized a special standard for professional services in cases involving

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[11] Petitioner's Statement of the Case at 4.

[12] Petitioner's Appendix A at 31.

[13] The "reiteration" is apparently a reference to this Court's discussion of the Sherman Act's application to the commercial activity of the learned profession in *National Society of Professional Engineers, supra,* and *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

[14] Petitioner's Appendix A at 12.

direct price restraints. Fee schedules were found to be "a classic illustration of price fixing" in *Goldfarb*, 421 U.S. 773, 783 (1975), and the rule of reason standard was not employed. In *Professional Engineers*, the Court clarified, by case example, why price restraints cannot be analyzed in the same fashion as other types of free market restrictions.

> Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp.*, 393 US 333, 337. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

National Society of Professional Engineers, supra, 435 U.S. at 692.

These two cases, cited by the Ninth Circuit majority as suggesting a "professional services immunity" from the per se standard of antitrust liability, illustrate just the opposite. [15] Both of these decisions reaffirm what the Sherman Act directs: a judicial focus upon the particular anticompetitive practice at issue as opposed to an analysis of an entire industry. Both

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[15] Moreover, as petitioner Arizona noted, the Ninth Circuit's recognition of a special standard of antitrust liability for doctors creates a conflict among the circuits on the question of applying per se rules to price restraints by professional groups. The application of the per se rule in *Ballard v. Blue Shield of Southern West Virginia, Inc.*, 543 F. 2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) and *United States v. National Society of Professional Engineers*, 555 F.2d 978 (D.C.Cir. 1977), *aff'd*, 435 U.S. 679 (1978) underscores the conflict and presents another compelling reason for the Court to grant certiorari in this case.

cases firmly reiterate this Court's respect of the Sherman Act's unequivocal ban on price fixing, regardless of the occupation of the offenders or the economic impact of the offense.

C. The Majority Opinion of the Ninth Circuit Impedes Effective Enforcement of State Antitrust Laws.

A "reasonable price" defense to horizontal price fixing, as apparently recognized by the Ninth Circuit, will effectively curtail the ability of state antitrust enforcement divisions to preserve the free market forces of the economy. Prior to the opinion at issue here, the matter of economic impact resulting from a horizontal conspiracy to set prices was relevant only to the question of damages. If a professional group of private doctors who agree to uniform fee schedules are not liable unless the state can establish the fixed rates are unreasonable, it simply will not be practical to prosecute such cases.

Injunctive relief is a powerful enforcement tool given the limited resources of the state attorneys general. For the average private citizen, unable to afford the cost of private antitrust litigation, reliance on governmental antitrust enforcement is critical. In Arizona, the injunction dissolved by the Ninth Circuit now removes the only protection afforded the general citizenry from the inflated costs of a medical care industry accounting for 10 per cent of Arizona's Gross State Product. [16]

The Ninth Circuit opinion not only renders impractical the states' ability to prosecute horizontal price fixing, but also casts doubt on the proper standards for state officials to follow in regulating professional serv-

[16] Exhibit D to CR 68; CR 13, 14, 109.

ices. If the "learned professions" can fix "reasonable" price standards, are state bar associations now free to poll their membership and adopt maximum fee schedules? Should state workmen compensation courts turn to the state medical associations for guidance in awarding reasonable damages? May brokers use the state real estate commission as a conduit for establishing uniform fee guidelines?

The ability of the *amici* states and their attorneys general to properly advise these state officials has been eroded by the legal uncertainties created by the circuit opinion. But the ultimate victims of a decision which carves a special exemption for professional services will be the citizens and consumers we represent.

The *amici* states share the concern of this Court [17] and Congress [18] over the astronomical rise in medical provider costs during the past decade. It is respectfully submitted that removing the health care industry from the competitive forces of a free marketplace will simply increase those costs.

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[17] *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 232 n. 40 (1979).

[18] *E.g., Skyrocketing Health Care Costs: The Role of Blue Shield: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 95th Cong., 2d Sess., 4-34 (1978). (Remarks of Michael Pertschuk, Chairman, Federal Trade Commission.)

CONCLUSION

For the foregoing reasons, the *amici* states respectfully submit that the State of Arizona's petition for writ of certiorari should be granted.

Dated this 26th day of September, 1980.

Respectfully submitted,

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